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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

NO. 745.

THE UNION TRUST COMPANY OF PITTSBURGH,
Trustee, JOHN MARSHALL LOCKHART
TRUST NO. 2, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, The Union Trust Company of Pittsburgh, Trustee, John Marshall Lockhart Trust No. 2, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals entered in the above entitled cause on September 27, 1940, following which petition for rehearing was filed on October 25, 1940, and was denied by the Circuit Court of Appeals for the Third Circuit on November 7, 1940.

Summary Statement of the Matter Involved.

The relevant facts, as stipulated by the parties (R. 176-189), disclosed by the trust instrument together with amendments thereto (R. 36-67), and as found by the Board of Tax Appeals, may be summarized as follows:

On December 28, 1922, John Marshall Lockhart established a trust *inter vivos* naming The Union Trust Company of Pittsburgh trustee. Pursuant to the terms of the trust instrument, Mr. Lockhart transferred property to the trustee having a market value on January 1, 1923, of $1,411,350.

Under the provisions of the trust instrument, as amended, the trustee was required to collect the income from the trust property and dispose of all of such income each year by (a) the payment of commissions, attorneys' fees, and expenses, (b) the payment of $500 monthly to seven named individual beneficiaries, making a total of $42,000 annually, and (c) the payment of the balance of said income to or for the permanent and exclusive benefit of The Western Penna. Hospital of Pittsburgh, Pennsylvania, a charitable institution and recognized as such by the Commissioner of Internal Revenue.

The instrument further provides that as the payments to the individual beneficiaries terminate by death (two of these have now terminated by death, reducing from $42,000 to $30,000 the income to be distributed annually to individual beneficiaries), this income also becomes payable to The Western Penna. Hospital of Pittsburgh. Thus, ultimately, the entire income of the trust fund will inure to the benefit of and be paid to the hospital.

In a subsequent paragraph of the trust instrument, it is provided that: "In the event that the income of said

trust fund shall not in any year be sufficient * * *" to pay the amounts that the trustee was directed to distribute to each individual beneficiary out of income, the trustee is authorized and directed to withdraw from the principal such amount as may be necessary to supply the deficiency. The income has at all times since the creation of the trust been sufficient to make the payments provided for the individual beneficiaries leaving a balance payable to the hospital, and consequently the trustee has never had authority to pay over any part of the principal to such individual beneficiaries and neither have the individual beneficiaries had any right or claim to any part of the corpus. During the eleven-year period from 1923 through 1933 the ordinary net income of the trust amounted to $904,926.73, not including $254,701.25 capital gains (R. 186). Of this $904,926.73 of ordinary net income, $462,000.00 was currently distributed to the individual beneficiaries and the balance of $442,926.73 was paid to or permanently set aside for the hospital.

In its income tax returns filed for the calendar years 1932 and 1933, the trustee deducted from its taxable income, under the provisions of section 162(b) of the Revenue Act of 1932, the distributions of income, totalling $42,000, made in each of those years to the seven individual beneficiaries. The income so distributed was returned by the individual beneficiaries and all tax due thereon was paid by them. The Commissioner determined that the amounts distributed to the individual beneficiaries were taxable to the trust and accordingly determined deficiencies in tax against the trustee for 1932 and 1933. The United States Board of Tax Appeals in a memorandum opinion rendered by a Division consisting of one member of the Board, and not reviewed by the Board, sustained the Commissioner without deciding whether the individual beneficiaries held a charge against the corpus of the trust fund. The Circuit Court

of Appeals for the Third Circuit affirmed the decision of the Board, pointing out that the "case lies in the field of an especially puzzling problem" and stating that the "responsibility" for the relief asked by petitioner "lies elsewhere."

Under the determination of the Commissioner, all taxes assessed and paid at any time come out of the income which would otherwise be paid to or be permanently set aside for the benefit of The Western Penna. Hospital.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on September 27, 1940, and Petition for Rehearing was denied on November 7, 1940. This Court has jurisdiction to review by virtue of the Internal Revenue Code, Section 1141(a), 26 U. S. C. A. Section 1141(a) and Section 240(a) of the Judicial Code, as amended, (28 U. S. C. A. § 347(a)). This petition, the annexed brief, and the record have been filed within the time prescribed by the Act of February 13, 1925, c. 229, § 8, 43 Stat. 940, 28 U. S. C. A. § 350.

Question Presented.

Where by the provisions of a trust instrument the trustee is directed to collect the income from the trust estate and distribute all such income annually, partly in specified amounts to individuals named and the balance thereof to or for the use of a charitable corporation which is the sole residuary beneficiary of the trust, is the tax on that portion of such income distributed to the individual beneficiaries, and otherwise payable by the individual beneficiaries, made a tax payable by the trustee and deductible from income otherwise payable to the charitable corporation by reason of a subsequent provi-

sion in the trust instrument directing the trustee to supplement, by withdrawals from principal, the income so distributed to the individual beneficiaries if such income in any year should not equal the amounts specified in the trust instrument?

Reasons for Granting the Writ.

1. The issue here presented involves an important question of Federal law that has not been passed upon by this Court.

2. The decision of the Board of Tax Appeals in this case as affirmed by the Circuit Court of Appeals for the Third Circuit is in direct conflict with Section 162(b) of the Revenue Act of 1932. It is in conflict with the rule laid down by this Court in *Irwin v. Gavit,* 268 U. S. 161, and erroneously extends the principles found applicable in the cases of *Burnet v. Whitehouse,* 283 U. S. 148 and *Helvering v. Pardee,* 290 U. S. 365. The Board of Tax Appeals and the Circuit Court of Appeals for the Third Circuit failed entirely to recognize the fact that a gift, devise or bequest need not be solely either of income or of principal, but may consist partly of both, and that a gift that by the whole tenor of the instrument is a gift of income does not lose its character as such because there is a contingent supplementary or additional gift of principal.

3. This Court should review this case in order to remove confusion existing in the lower courts with respect to the proper application of Section 162(b) of the Revenue Act of 1932 and the corresponding section in the Internal Revenue Code, in order to prevent recurring litigation on this subject, and in order to declare the principles of taxation applicable in case of gifts of both income and principal.

4. The decision of the lower court in this case results in an injustice erroneously imposed upon a charitable corporation which will require a decision of this Court to rectify.

Prayer.

For the foregoing reasons, your petitioner prays that a writ of certiorari be issued out of this Court to the United States Circuit Court of Appeals for the Third Circuit, commanding said Circuit to certify and send to this Court on a day to be determined, a full and complete transcript of the record of all the proceedings of such Circuit Court of Appeals had in this case to the end that this case may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals for the Third Circuit be reversed; and that petitioner be granted such other and further relief as may be proper.

And your petitioner will ever pray, etc.

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TRUSTEE, JOHN MARSHALL LOCKHART TRUST
NO. 2.

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